

## REMARKS

In the Office Action, claims 1-4 and 6 are rejected under 35 U.S.C. §102; and claims 7-10, 13-15 and 21 are rejected under 35 U.S.C. §103. Applicants believe that the rejections are improper as set forth in detail below.

In the Office Action, claims 1-4 and 6 are rejected under 35 U.S.C. §102. More specifically, claims 1-4 and 6 are rejected in view of EP0850569; claims 1-4 and 6 are further rejected in view of WO99/22604; and claims 1 and 3 are rejected in view of EP0862863.

Applicants believe that the anticipation rejections are improper. Of the pending claims at issue with respect to the anticipation rejections, claim 1 is the sole independent claim. Claim 1 recites a method for improving activity in a pet. The method includes administering to the pet a nutritional agent that promotes the growth of bifido- and lactic-bacteria in the gastro-intestinal tract of the pet.

Applicants have found that administering to a pet a nutritional agent which promotes the growth of bifido- and lactic-bacteria in the gastro-intestinal tract of the pet can result in improved activity levels in the pet. This is particularly noticeable in elderly pets. Without wishing to be bound by theory, it is believed that, amongst other mechanisms, increasing the concentrations of bifido- and lactic-bacteria in the gastro-intestinal tract of the pet can produce nutrients and/or increasing the absorption of nutrients. This can provide the pet with better nutrition and more energy. Further, increasing the concentrations of bifido- and lactic-bacteria in the gastro-intestinal tract of the pet can reduce the concentrations of pathogenic bacteria in the gastro-intestinal tract and this may improve systemic inflammatory status, thus leading to less joint stiffness.

In contrast, Applicants believe that the cited art is deficient with respect to the claimed invention. For example, Applicants believe that the cited art fails to disclose or arguably suggest a method for improving activity in a pet by administering to the pet a nutritional agent as claimed. Contrary to the Patent Office's position, nowhere does the cited art disclose or suggest a link between promoting the growth of bifido- and lactic-bacteria in order to improve activity. Nor does the cited art link inulin or prebiotics to increased/improved levels of physical activity. Indeed, by addressing gut health, the physical activity level of the pet can be increased as Applicants have recognized. In other words, gut health is a pathway to providing the owner with an active pet.

Further, Applicants do not believe that the cited art inherently discloses the claimed invention. Of course, “[i]nherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.” (*In re Oelrich*, 212 USPQ 323, 326 (C.C.P.A. 1981) (quoting *Hansgirg v. Kemmer*, 40 USPQ 665, 667) (C.C.P.A 1939). Rather, there must be some objective evidence or technical reasonings to support the conclusion of inherency. MPEP §2112. Again, the cited art provides no link between improved activity and promoting the growth of bifido- and lactic-bacteria. This clearly contrasts the claimed invention that recites a method for improving activity in a pet by administering the nutritional agent which promotes the growth of bifido- and lactic-bacteria in the gastro-intestinal tract of the pet. Thus, Applicants believe that the claimed invention is distinguishable from the cited art.

Based on at least these reasons, Applicants believe that the cited art fails to disclose, explicitly or inherently, the claimed invention. Therefore, Applicants respectfully submit that the cited art fails to anticipate or arguably render obvious the claimed invention.

Accordingly, Applicants respectfully request that the anticipation rejections be withdrawn.

In the Office Action, claims 7-10, 13-15 and 21 are rejected under 35 U.S.C. §103(a) over WO99/22604 and EP0850569 in view of EP0862863, U.S. Patent No. 6,156,355 (“*Shields*”) and *Lowe*, and further in view of U.S. Patent No. 6,596,303 (“*Bui*”) and U.S. Patent No. 5,709,855 (“*Bockow*”). The Patent Office primarily relies on WO99/22604 and EP0850569 and thus relies on the remaining cited art to remedy the deficiencies of same. Applicants believe that the obviousness rejection is improper.

Of the pending claims at issue, claims 7, 14, 15 and 21 are the sole independent claims. Claim 7 recites a method for improving activity in an elderly pet. The method includes administering to the pet a nutritionally complete pet food which contains a nutritional agent which promotes the growth of bifido- and lactic-bacteria in the gastro-intestinal tract of the pet. Claim 14 recites a method for improving activity in an elderly dog. The method includes administering to the dog a nutritionally complete pet food which contains a nutritional agent that promotes the growth of bifido- and lactic-bacteria in the gastro-intestinal tract of the dog. Claim 21 recites a method for improving activity in an elderly dog. The method includes administering to the dog a nutritionally complete pet food that contains a prebiotic selected from the group of

inulin, fructooligosaccharides and plant materials which contain inulin and/or fructooligosaccharides. As previously discussed, the present invention provides that the physical activity level of a pet can be increased by addressing gut health. In this regard, Applicants have recognized that gut health is a pathway to providing the owner with an active pet.

In contrast, Applicants believe that the cited art, even if combinable, is deficient with respect to the claimed invention. At the outset, the primary references are deficient with respect to the claimed invention, at least for substantially the same reasons as discussed above. Thus, Applicants do not believe that the primary references disclose or suggest methods for improved activity in a pet, such as an elderly pet, by administering a nutritional agent that promotes the growth of bifido- and lactic-bacteria in the gastro-intestinal tract of the pet.

Further, Applicants do not believe that the remaining cited art can be relied on, solely, to remedy the deficiencies of the primary cited references. Indeed, the Patent Office merely relies on the *Bui* and *Bockow* references for their alleged teachings regarding that fatty acids are beneficial. See, Office Action, page 6. Moreover, the Patent Office merely relies on the *Lowe* reference for its alleged teaching that a reduced efficiency of the digestive tract can occur as a result of age and infection. With respect to EP0862863, this reference is deficient with respect to the claimed invention, like the primary references, at least for substantially the same reasons as discussed above.

Further, Applicants do not believe that the *Shields* reference can be relied on to remedy the deficiencies of the other cited references. Indeed, the *Shields* reference merely provides various dietary options that are tailored to different working dog activities and breeds. As set forth in column 4 of *Shields*, for example, diets with different percentages of fat calories are intended for different applications. Thus, the emphasis of *Shields* is on using energy content as a way to influence the work output of the different dogs. This is clearly different from the claimed method of increasing overall physical activity levels by addressing gut health.

Moreover, Applicants question why the Patent Office would combine *Shields* with any of the other cited references in the first place. Indeed, in *Shields*, energy management is achieved through control of calorie intake by diet formulation as discussed above. Thus, there is no suggestion that the selective promotion of desirable bacterial colonization in the gastro-intestinal tract can lead to a pet that exhibits enhanced activity levels.

For example, the “Herding formula” of *Shields* provides “a high energy level without excessive use of fat.” See, *Shields*, column 11, lines 14-15. This energy level provides calories for the pet to burn in its working activities. However, this has effectively nothing to do with the prebiotics in the formula which are included to stop diarrhea. See, *Shields*, column 11, lines 25-52. Thus, *Shields* provides no suggestion that it can or should be used to improve generally the activity level of a pet.

Even the “Non-Sporting formula” that is designed to provide “moderate energy,” includes chicory extract, namely inulin. See, *Shields*, column 9, line 63 to column 10, line 5. This demonstrates that the inclusion of chicory has effectively no impact on the enhancement of activity levels of the dogs concerned, contrary to the Patent Office’s position. Based on at least these reasons, the *Shields* reference is clearly deficient with respect to the claimed invention.

The Patent Office further contends that the benefits shown for all dogs would extend to benefit elderly dogs. However, if an elderly pet is presented with diminished capacity for movement, it is not apparent that administering a composition formulated with known aids for improving gastro-intestinal function, such as digestion, will result in regained activity. Likewise, no link has been established in the prior art between gut health and joint inflammation or stiffness. In general, veterinarians and the like do not administer gut health supplements as a way to improve activity or decrease joint stiffness in elderly pets. As is well known, the causes of elderly pet inactivity are different from those in younger pets. Thus, Applicants do not believe that the Patent Office can rely on this mere conclusion in support of the obviousness rejection.

Applicants also contest the Patent Office’s assertion on page 5 of the Office Action that concluded with “and hence an increase in pet activity for such elder pets.” In this regard, no link has been established in the prior art between immune function and physical activity levels. Further, no link has been established in the prior art between gut health and joint inflammation or stiffness as discussed above. In general, veterinarians and the like do not administer immune stimulators or gut health supplements as a way to improve activity or decrease joint stiffness in elderly pets. Thus, Applicants do not believe that the Patent Office can rely on this mere conclusion in support of the obviousness rejection.

What the Patent Office has done is to rely on hindsight reasoning in support of the obviousness rejection. Again, the primary references are clearly deficient with respect to the claimed invention at least for substantially the same reasons as discussed above. Further, the

supplemental references are also deficient and, thus, cannot be relied on solely to remedy the deficiencies of same. Moreover, the Patent Office has improperly relied on mere conclusions in an attempt to remedy the deficiencies of the cited art as discussed above. Therefore, Applicants do not believe that one skilled in the art would be inclined to modify the cited art to arrive at the claimed invention.

Based on at least these reasons, Applicants believe that the cited art fails to disclose or suggest the claimed invention. Therefore, Applicants respectfully submit that the cited art, even if combinable, fails to render obvious the claimed invention. Accordingly, Applicants respectfully request that the obviousness rejection be withdrawn.

Applicants note for the record that claims 5, 11, 12 and 16-20 have not been rejected. Thus, Applicants request that the record reflect that these claims be allowed as presently pending or objected to as being dependent upon a rejected base claim. To the extent that the Patent Office had intended to reject these claims as well, Applicants believe that the subject matter as defined therein is patentable at least for substantially the same reasons as discussed above.

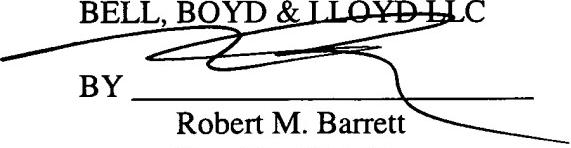
Applicants further note that claims 22-26 have been newly added. No new matter has been added thereby. Applicants respectfully submit that the subject matter as defined in the newly added claims is patentable over the cited art for at least substantially the same reasons as discussed above.

For the foregoing reasons, Applicants respectfully submit that the present application is in condition for allowance and earnestly solicit reconsideration of same.

Respectfully submitted,

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